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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re KENNETH S., a Person Coming
Under the Juvenile Court Law.

B265074
(Los Angeles County
Super. Ct. No. CK52648)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

KENNETH S.,

Defendant and Appellant,

K.F.,

Objector and Respondent.

APPEAL from an order of the Superior Court of Los Angeles County,
Terry Troung, Juvenile Court Referee. Reversed and remanded.

Joseph T. Tavano, under appointment by the Court of Appeal, for
Defendant and Appellant Kenneth S.

Linda Rehm, under appointment by the Court of Appeal, for Objector and
Respondent K.F.

No appearance for Plaintiff and Respondent.

INTRODUCTION

Kenneth S. (Kenneth) appeals from the juvenile court's order allowing him only monitored visits with his son, Kenneth S. III (Kenny), and terminating jurisdiction over Kenny pursuant to Welfare and Institutions Code section 364.¹ Kenneth argues that the court abused its discretion by denying his requests for a contested hearing on visitation and for unmonitored visits with Kenny. We conclude that the court should have allowed Kenneth to present evidence on visitation before issuing an "exit order" and terminating jurisdiction over Kenny, and that the court's error prejudiced Kenneth. Therefore, we reverse the juvenile court's order granting Kenneth monitored visitation only, and remand for an evidentiary hearing to determine the scope of Kenneth's visitation rights.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Initial Detention and Visitation Orders*

On June 24, 2014 the Los Angeles County Department of Children and Family Services filed a petition on behalf of Kenny, then five years old, and his older half-brother Robert,² pursuant to section 300, subdivisions (a), (b), and (j), alleging that Kenneth and the children's mother K.F. had a history of domestic violence and substance abuse. Kenneth and K.F. pleaded no contest. The court sustained an amended petition pursuant to section 300, subdivisions (a) and (b). Among other things, the court found that Kenneth, in front of the children, had broken K.F.'s ribs and teeth, pushed her to the ground, and restrained her. The court also found that Kenneth had struck Kenny's brother Robert with a belt. With regard to substance abuse, the court found that Kenneth was a periodic user of amphetamine, methamphetamine, and alcohol, and that he used these substances while supervising Kenny and Robert.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² Robert is not a party to this appeal.

On September 3, 2014 the court removed Kenny from the custody of his parents (who no longer lived together) and ordered the Department to provide reunification services. The court also ordered Kenneth and K.F. to participate in substance abuse and domestic violence programs, and to submit to drug and alcohol testing. The court initially ordered monitored visits for both parents, but later modified its order to allow unmonitored visits for K.F. and unmonitored visits in a public place for Kenneth.

An interim review report filed November 13, 2014 stated that K.F. had made progress in treatment and had no positive drug tests. According to the report, Kenneth had also made progress in treatment, but he had tested positive for alcohol three times. Kenneth explained that he did not know the tests checked for alcohol, and that had he known he would not have consumed alcohol.

Also on November 13, 2014 K.F. filed a petition under section 388 asking the juvenile court to place Kenny with her.³ On December 19, 2014 Kenneth filed a section 388 petition asking the court to place Kenny with him or to allow unmonitored, overnight visits. On January 5, 2015 the court granted K.F.'s petition and placed Kenny with her. The court denied Kenneth's petition.

On January 16, 2015 the Department filed a petition under section 388 and an ex parte application under section 385 asking the court to order monitored visits again for Kenneth. The Department alleged that, during an unmonitored visit with Kenny on January 10, 2015, Kenneth "demanded" that Kenny show him the confidential domestic violence shelter where he and his mother lived, which violated a restraining order protecting K.F. from Kenneth. According to Kenny, his father became angry and yelled at him when he refused to disclose where he and his mother lived. The Department also alleged that Kenneth took Kenny to his home for most of the day, which violated the court's visitation order allowing visits only in public settings. According to a Department

³ Section 388, subdivision (a)(1), allows a parent to petition the juvenile court to modify, change, or set aside a previous order regarding visitation where there has been a "change of circumstance or new evidence." (§ 388, subd. (a)(1); see *In re D.B.* (2013) 217 Cal.App.4th 1080, 1089.)

interview with Kenny, Kenneth “asked him to lie and told him that when he talks, he [Kenneth] gets in trouble at court.” Kenny also told the Department, “Dad is mean to me.” The court granted the Department’s section 385 application, ordered monitored visitation for Kenneth’s future visits with Kenny, and scheduled a hearing on the Department’s section 388 petition.

At the hearing on March 4, 2015 Kenneth conceded he had violated the court’s order allowing unmonitored visits in public settings by taking Kenny to his home, but explained he had taken Kenny there only because Kenny’s clothes were wet from the rain, and Kenneth needed to wash and dry them before returning Kenny to his mother. Kenneth also admitted he had instructed Kenny not to tell anyone he had been to his father’s house. Kenneth denied ever asking Kenny where he and his mother lived, and questioned why Kenny would ever say his father had asked where they lived, particularly in light of the fact that Kenneth had remarried and had virtually no relationship with K.F.

The Department argued for monitored visitation in light of the “overwhelming evidence that [Kenneth] violated the orders of the Court and tried to find where [K.F.] was residing.” Counsel for Kenny said that Kenny enjoyed spending time with his father, and asked that the court give the Department discretion to allow unmonitored visits in a public setting again when appropriate.

The court granted the Department’s section 388 petition, finding Kenneth’s testimony was not credible, and there was no reason Kenny would make up the story about his father asking him where he and his mother lived. The court ordered monitored visits for Kenneth and gave the Department the discretion to liberalize visitation.

After learning of Kenneth’s attempts to locate her residence, K.F. obtained a criminal protective order against him in Orange County Superior Court. The order prohibited Kenneth from having any personal contact with K.F. or Kenny. The order did not include an exception for monitored visits authorized by a juvenile court.

B. *The Section 364 Review Hearing*

On May 5, 2015 the juvenile court held a review hearing pursuant to section 364 to determine whether to terminate its jurisdiction over Kenny or to continue supervision. The Department's status review report filed in connection with the hearing reported that Kenny was doing well in K.F.'s care and that both parents were complying with the court's orders and treatment programs. With regard to Kenneth's drug and alcohol tests, the report noted that all of the recent tests were negative, with the exception of two missed tests, which the Department deemed "dirty." Kenneth told the Department he did not get the social worker's message in time to submit to testing on the dates of the missing tests.

The Department's report included conflicting information about Kenny's relationship with his father. Kenny's therapist said that Kenny told her he did not want to see his father because the visits were boring and he was afraid of him. The therapist also reported that Kenny told her his father had once locked him in a closet. Kenny repeated most of these statements to a Department social worker. At a monitored visit, however, the Department's social worker observed that Kenny's face was filled "with joy and excitement" when he saw his father, and at the end of the monitored visit Kenny denied he was afraid of his father and denied the previous statements he had made to his therapist about his father. The social worker also observed that during the visit Kenneth was appropriate and engaging with Kenny, and that the two were "bonded." In a later interview conducted in K.F.'s presence, Kenny told the social worker he wanted unmonitored visits with his father.

The Department further reported that Kenneth "loves his child [Kenny] very much and that they both have a strong bond when they are together." Kenneth denied ever asking Kenny where he and his mother lived. Just a few days before the protective order became effective, the Department notified Kenneth it would again allow him to have unmonitored visits with Kenny. The Department's report recommended, however, that the juvenile court terminate jurisdiction over Kenny, grant K.F. sole legal and physical custody of Kenny, and continue to allow Kenneth only monitored visits with Kenny.

At the section 364 hearing, counsel for Kenneth asked for a contested hearing on visitation. The court interrupted counsel and said, “No.” The transcript reveals the following exchange:

“[Counsel for Kenneth]: “Well, you’re going to let me set it for contest?”

“The Court: “I am not letting you set it for contest, given that there is a criminal protective order not even allowing him visits. I have no idea when [Kenneth] would be able to get it changed, considering it was just ordered by the criminal court.

“[Counsel for Kenneth]: If the court –

“The Court: I am not allowing you to set it for a hearing. Take me up on it.

“[Counsel for Kenneth]: So can I tell you what my other choice would be? It would be over my objection, but if you’re not going to allow me to set it . . . I’m asking that it be sole legal, sole physical. Father to have unmonitored, minimum of two times a week, two hours, on condition that it is not contraindicated by any criminal restraining order.

“The Court: I’m not changing his visitation from monitored to unmonitored at this time.

“[Counsel for Kenneth]: You won’t let me set it for contest?”

“The Court: No. . . . Counsel, there’s a reason why I changed his visits from unmonitored to monitored. Unless there’s been some extraordinary circumstances that have changed, I don’t see a reason why I need to change it back to unmonitored.”

Counsel for Kenneth then argued that Kenneth’s recent progress in his treatment and counseling plan supported unmonitored visits. When counsel for Kenneth began to list his client’s accomplishments, the court said, “take it up with the family law court. When he can get that criminal protective order changed, he can take it up with the family law court.” Counsel for Kenny stated, “I do think this is unfortunate. My client really wants visits with his dad. I don’t know what happened in the Orange County court, but I can’t imagine that they really were contemplating him not having any visits with his

child. And he needs to go back to court there. I really think this is a mistake.” The court responded, “I agree with you on that one. I would have just left it at monitored visits.” Counsel for Kenneth then explained that Kenneth was going back to the Orange County court 10 days later, on May 15, 2015, to request modification of the protective order, and counsel said she was only asking the juvenile court to set a contested hearing on visitation “a week after May 15th.”

The court asked counsel for Kenny for his views on unmonitored visits. Counsel for Kenny said his “reading of the [status review] report is that the Department would have unmonitored his visits but for finding out that there’s a restraining order in Orange County.” Counsel for Kenny also argued that his client was not at risk of harm from his father because the only physical altercations in the past had been between Kenneth and K.F. The court asked, “Regardless of what he’s done in the January incident?” Counsel for Kenny said he was not convinced the January incident occurred the way the court understood it occurred.

Counsel for K.F. argued that Kenneth’s history of domestic violence and his violation of the previous protective order justified monitored visits. Counsel said she was concerned that Kenneth would “use his son to get to my client.” “It happened recently, and we’re just concerned it’s going to happen again.” Counsel for the Department did not take a position.

The court terminated jurisdiction over Kenny and granted sole physical custody to K.F. The court ordered monitored visits for Kenneth as long as they did not conflict with any criminal court protective order. On May 19, 2015 Kenneth filed a timely notice of appeal.

DISCUSSION

A. Standard of Review

We review a juvenile court’s visitation order for abuse of discretion. (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356; *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300 (*Bridget A.*)). “When applying the deferential abuse of

discretion standard, “the trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.””” (In re Maya L. (2014) 232 Cal.App.4th 81, 102.) “““When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.””” (In re A.R. (2015) 235 Cal.App.4th 1102, 1117.)

To the extent Kenneth’s request for a contested hearing would have required a continuance of the section 364 review hearing, we review the juvenile court’s denial of such a continuance for abuse of discretion. (See In re B.C. (2011) 192 Cal.App.4th 129, 144; In re Elijah V. (2005) 127 Cal.App.4th 576, 585.) The court abuses its discretion when it misinterprets or misapplies the law. (In re Jack C. (2011) 192 Cal.App.4th 967, 984; see Prigmore v. City of Redding (2012) 211 Cal.App.4th 1322, 1334.)

B. *The Juvenile Court Erred by Denying Kenneth’s Request To Set a
Contested Hearing on Visitation and Refusing To Continue the Section 364
Hearing for a Few Weeks*

Section 364 requires the juvenile court to review every six months the status of a child the court has declared a dependent of the juvenile court and placed in the custody of a parent. (§ 364, subd. (a); In re Aurora P. (2015) 241 Cal.App.4th 1142, 1154; Bridget A., *supra*, 148 Cal.App.4th at p. 303.)⁴ At a hearing conducted pursuant to section 364, the juvenile court “shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn.” (§ 364, subd. (c).)

⁴ Section 364 applies to a child like Kenny whom the court initially removed from his or her parents’ custody but later placed with a parent before the status review hearing. (Bridget A., *supra*, 148 Cal.App.4th at pp. 313-316.)

Under section 362.4, “[w]hen a juvenile court terminates its jurisdiction over a dependent child, it is empowered to make ‘exit orders’ regarding custody and visitation.” (*In re T.H.* (2010) 190 Cal.App.4th 1119, 1122 (*T.H.*); see *In re Kenneth S.* (2008) 169 Cal.App.4th 1353, 1358.)⁵ In defining a parent’s visitation rights, the court must balance the rights of the parent with the best interests of the child. (*In re R.R.* (2010) 187 Cal.App.4th 1264, 1284.) Visitation orders issued at a section 364 hearing “become part of any family court proceeding concerning the same child and will remain in effect until they are terminated or modified by the family court.” (*T.H.*, at p. 1123; see *In re A.C.* (2011) 197 Cal.App.4th 796, 799.)⁶

Section 362.4 entitles a noncustodial parent to a hearing to show why the juvenile court should change an existing visitation order before terminating jurisdiction and transferring the case to the family law court. (*In re Michael W.* (1997) 54 Cal.App.4th 190, 194-195 (*Michael W.*); accord, *In re Roger S.* (1992) 4 Cal.App.4th 25, 30; see *T.H.*, *supra*, 190 Cal.App.4th at p. 1124 [in making exit orders, “the court should consider any relevant evidence proffered by the parties regarding the terms of the visitation order”].) If the juvenile court refuses to accept evidence relevant to the visitation order, the court may issue ““an uninformed order which could fail to serve the best interests of the child.”” (*Michael W.*, at p. 196.)

A juvenile court may also continue a dependency hearing at a parent’s request for good cause, provided the continuance is not contrary to the interests of the child.

⁵ Section 362.4 provides: “When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor’s attainment of the age of 18 years, and . . . an order has been entered with regard to the custody of that minor, the juvenile court on its own motion, may issue . . . an order determining the custody of, or visitation with, the child.”

⁶ There need not be an existing family court proceeding at the time the juvenile court makes an exit order. Section 362.4 provides: “If no action is filed or pending relating to the custody of the minor in the superior court of any county, the juvenile court order may be used as the sole basis for opening a file in the superior court of the county in which the parent, who has been given custody, resides.”

(§ 352, subd. (a); *In re Emily D.* (2015) 234 Cal.App.4th 438, 448; *In re B.C.*, *supra*, 192 Cal.App.4th at p. 144; Cal. Rules of Court, rule 5.550(a)(1).) A child's interests include prompt resolution of his or her custody status, a stable environment, and avoiding prolonged temporary placements. (§ 352, subd. (a).) Although a pending criminal case, without more, is not good cause, "there is no legal impediment for slight and justified delays . . . [p]rovided the court complies with the statutory requirements authorizing continuances under section 352." (*In re Sean E.* (1992) 3 Cal.App.4th 1594, 1598, fn. 4, 1599; see *In re B.C.*, at p. 143 ["if it is not contrary to the interests of the minor child, a trial court may grant a continuance in a dependency case for good cause shown, for the period of time shown to be necessary"].)

Kenneth argues that the juvenile court abused its discretion by refusing to continue the section 364 review hearing for approximately two weeks and refusing to set a contested hearing on visitation after the next hearing in his Orange County Superior Court case. Although Kenneth did not explicitly request or move for a continuance in the juvenile court, his request for a contested hearing on visitation before the court made an exit order on visitation necessarily included a request for a continuance of the section 364 hearing, because the court could not make an exit order after terminating jurisdiction under section 364. (See *In re Kenneth S.*, *supra*, 169 Cal.App.4th at p. 1358.)

We conclude that the juvenile court erred by denying Kenneth's request for an evidentiary hearing under section 362.4 and precluding him from presenting any evidence or argument on visitation at such a hearing. The court did allow counsel for Kenny and counsel for K.F. to weigh in on (but did not allow them to present any evidence regarding) whether Kenneth's visitation should be monitored or unmonitored. But when counsel for Kenneth attempted to explain how the changed circumstances supported unmonitored visitation, the court interrupted and told counsel for Kenneth, "take me up on it" and "take it up with the family law court." Although the court has discretion to ask for an offer of proof before holding an evidentiary hearing (*In re Earl L.* (2004) 121 Cal.App.4th 1050, 1052-1053; see *In re A.B.* (2014) 230 Cal.App.4th 1420, 1439 [*Michael W.* and *Roger S.* "do not require the court as a matter of due process to hold an

evidentiary hearing without regard to an offer of proof”]), the court did not ask counsel for Kenneth for an offer of proof. Nor, from our review of the transcript, did the court give counsel for Kenneth the opportunity to make an offer of proof, or even let her finish her sentences, before the court denied the request for a hearing on visitation. As a result, the court did not hear all of the “relevant evidence proffered by the parties regarding the terms of the visitation order.” (*In re T.H.*, *supra*, 190 Cal.App.4th at p. 1124; see *Michael W.*, *supra*, 54 Cal.App.4th at p. 196.)

The court also erred when it abused its discretion by refusing to continue the section 364 review hearing. (See *People v. Smith* (2016) 245 Cal.App.4th 869, 873 [trial court abused its discretion by denying request for continuance where the court misapplied the governing statute]; *In re Michael G.* (2012) 203 Cal.App.4th 580, 591 [juvenile court abused its discretion by denying continuance of section 366.26 hearing to allow time to receive evidence of current assessment of child’s adoptability].) Kenneth was only seeking a brief continuance of a few weeks to allow the Orange County court time to consider Kenneth’s request to modify the protective order. Because it appears that the Department was considering allowing Kenneth to have unmonitored visits with Kenny, and that the protective order was the only reason the Department was recommending monitored visits, the possibility that the Orange County court might modify the protective order to allow for contact with Kenny was directly relevant to Kenneth’s visitation rights. Finally, because Kenneth was not contesting Kenny’s placement with K.F., the brief continuance requested by Kenneth would not have delayed resolution of Kenny’s custody or prolonged any temporary placement. (See § 352, subd. (a); *In re B.C.*, *supra*, 192 Cal.App.4th at p. 144.) Therefore, there was good cause for the continuance, and the juvenile court abused its discretion in denying the request and refusing to give Kenneth a contested hearing on visitation.

C. *Kenneth Was Prejudiced*

“There remains the issue of prejudice.” (*Michael W.*, *supra*, 54 Cal.App.4th at p. 196; see *In re Chantal S.* (1996) 13 Cal.4th 196, 214.) “Reversal is justified ‘only

when the court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.”’ (*In re J.S.* (2011) 196 Cal.App.4th 1069, 1078; see *In re Cristian I.* (2014) 224 Cal.App.4th 1088, 1099.) “A reasonable probability is one sufficient to undermine confidence in the outcome of the proceedings.” (*In re Michael G.* (2012) 203 Cal.App.4th 580, 591.)

In crafting the visitation exit order, the juvenile court had to balance Kenneth’s visitation rights with Kenny’s best interests. (See *In re R.R.*, *supra*, 187 Cal.App.4th at p. 1284.) Here, we cannot know with reasonable assurance how the juvenile court would have balanced those rights and interests had the court granted Kenneth’s request for, and then conducted, a hearing. The record confirms that Kenny wanted unmonitored visits with his father and that the Department was going to liberalize Kenneth’s visits so that they would be unmonitored, until the Department learned of the Orange County criminal protective order, which at one point even the juvenile court commented was overbroad because it included Kenny. The record also shows that Kenneth had made considerable progress in his treatment plan. It is reasonably probable that the evidence Kenneth would have introduced at the hearing would have convinced the juvenile court, as it appears to have convinced the Department, that unmonitored visitation was appropriate, if Kenneth had been able to make any progress in convincing the Orange County court to modify the protective order. (See *In re J.F.* (2011) 196 Cal.App.4th 321, 336 [denial of evidentiary hearing was prejudicial where evidence might yield more favorable plan for dependent child].) Kenneth never had that chance.

Moreover, although we now know that the Orange County court did not vacate or modify the protective order on May 15, 2015, we also know that the Orange County court ultimately dismissed the case a few months later.⁷ Had the juvenile court left open its

⁷ We grant the motion by the Department to take judicial notice of the fact that on September 21, 2015 the Orange County court dismissed the criminal action against Kenneth S.

decision on visitation until after the May 15, 2015 hearing in the Orange County court, the Orange County court might have deferred to the juvenile court's decision on the scope of Kenneth's contact with Kenny, which in turn may have caused the juvenile court to consider the propriety of unmonitored visits more thoroughly. A short continuance to allow Kenneth to exercise his statutory right to present evidence on visitation would have eliminated this uncertainty and avoided the situation where all parties (except K.F.) and the court felt constrained by the Orange County court protective order. Even if the protective order were in effect on the date of the continued hearing, the juvenile court would have benefited from getting "all the help it can get before it makes an order affecting the lives of the children and parents who appear before it." (*Michael W.*, *supra*, 54 Cal.App.4th at p. 196.)

K.F. argues that Kenneth was not prejudiced because, as the juvenile court suggested, he can go to family court to challenge the visitation order. Prejudice is presumed, however, "from the simple fact that a family law court will naturally defer to a recent order of the dependency court concerning custody and visitation." (*Michael W.*, *supra*, 54 Cal.App.4th at p. 196.) "Since the orders made by a juvenile court at a section 364 hearing are necessarily made while dependency jurisdiction continues, it follows logically that a family law court would defer to those orders and hesitate to second-guess the juvenile court judge, at least absent something more than the ordinary showing of changed circumstances." (*Ibid.*) Had the juvenile court granted Kenneth's request and, following an evidentiary hearing, concluded that unmonitored visits were appropriate, Kenneth would not have to face an uphill climb in the family law court to modify the visitation order.

DISPOSITION

The order terminating jurisdiction is reversed. The matter is remanded to the juvenile court with directions to hold the evidentiary hearing requested by Kenneth, and then to decide whether visitation should be monitored or unmonitored.

SEGAL, J.

We concur:

PERLUSS, P. J.

BLUMENFELD, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.